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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

OCTAVE HOWARD,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN REPLY TO PETITIONER'S WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES The State of Texas, Respondent, in response and states:

OPINION BELOW

Petitioner's citation of such opinion is correct.

JURISDICTION

It is respectfully submitted that no substantial federal question is presented for review by this Court.

QUESTION PRESENTED

In a criminal prosecution for unlawfully carrying a

pistol, can the State of Texas read to the jury at the commencement of the trial allegations as to two prior similar convictions, and elicit evidence thereon before a finding of guilt or innocence on the primary offense without abridging the Defendant's rights to a fair trial before an impartial jury secured him by the Sixth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are cited in Petitioner's Brief.

STATEMENT OF THE NATURE OF THE CASE

The facts as shown in Petitioner's Brief are substantially correct.

ARGUMENT AND AUTHORITIES

Petitioner was not denied due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States because the indictment under which he was charged alleged two prior convictions and was read to the jury and proof of the prior convictions was made before the jury following the submission of proof of the principal offense. In support of this contention, Petitioner relies strongly on *Lane v. Warden, Maryland Penitentiary,* 320 F.2d 179 (4th Cir. 1963).

The United States Court of Appeals for the Fifth Circuit undertook the determination of this question in the instant case in *Breen v. Beto,* 341 F.2d 96 (5th Cir. 1965), which was decided on January 28, 1965. In that opinion, the Court disposes of *Lane v. Warden,* supra, with the following statement at page 97:

"In support of his contention, appellant cites and strongly relies on Lane v. Warden, 320 F(2) 179 (4th Cir. 1963). This court has never so held, and under the controlling Texas Statutes and the authorities we are not disposed to adopt or follow the cited opinion. On the contrary, we are of the firm view that that case was not well decided and that the correct view of the law is otherwise."

The Court of Appeals for the Fifth Circuit has also considered this matter in the cases of *Reyes v. Beto,* 345 F.2d 722 and *Taylor v. Beto,* 346 F.2d 157. The same contention was presented to the Supreme Court of the United States in the case of *Wendell Odell Stephens v. Beto,* 377 S.W.2d 139 (1964), by way of application for writ of certiorari. This Court denied certiorari in 1965, — U.S. —, 85 S.Ct. 1344, April 26, 1965.

By way of further discussion of *Lane v. Warden,* supra, Respondent submits the following.

In *Lane,* the Court of Appeals for the Fourth Circuit considered a conviction in a court of Maryland. The defendant was charged by indictment for selling narcotics and in the indictment two prior convictions were alleged for the purpose of enhancing punishment. (actually there were three indictments, each charging a principal offense together with two prior convictions). The defendant objected to the reading of the indictments because they contained the prior convictions, but his objection was overruled. The Court of Appeals held that the reading of the indictments with their allegations of prior convictions denied the defendant a fair trial because the fairness of the jury was impaired by the knowledge of the defendant's prior criminal history.

Respondent disputes the applicability of *Lane v.*

Warden, supra, urging that the facts of *Lane* are not analogous to the present case and also that the philosophy underlying the *Lane* decision is illogical and erroneous.

The *Lane* opinion at page 186 puts special emphasis on the proposition that the prejudice resulting from the reading of the two prior convictions to the jury could have been avoided by the State's following alternative Maryland procedures. No alternative methods of proving prior convictions are available under Texas practice.

Second, the defendant in *Lane* was charged under three indictments, each alleging the crime in issue, plus two prior convictions. Only one indictment is involved in the present case.

However, regardless of the facts and circumstances which distinguish LANE v. WARDEN *from the case before this Court, Respondent strongly urges that the reasoning in* LANE v. WARDEN *is specious and should not be followed.*

Wolfe v. Nash, 313 F.2d 393 (8th Cir. 1963) cert. den. — U.S. —, 84 S.Ct. 705 (Feb. 24, 1964) is directly contra to *Lane v. Warden.* In *Wolfe v. Nash,* the evidence of prior felony convictions of the defendant was offered in the presence of the jury and it was argued by the defendant that a fair trial was denied. The Court disposed of this proposition, saying at page 401:

> "... How and in what way proof of prior convictions shall be made under the State Habitual Criminal statute and what effect a deviation from the requirements of the statute would have, we regard as purely a local legal problem and of no national concern whatever. The due process clause of the Fourteenth Amendment does not enable us to review errors of state law."

The Texas decisions have uniformly upheld the constitutionality of its habitual offender enhancement statutes. *Mackie v. State,* 367 S.W.2d 697 (1963).

Not only is *Lane v. Warden* an innovation in criminal and constitutional law, its holding being in direct conflict to *Wolfe v. Nash,* the Texas authorities, and innumerable other state decisions which have construed habitual offender acts, but *Lane* relies in part on authority that is apparently completely contradictory to the holding. At page 181 of the *Lane* opinion, the Court cites *Michelson v. United States,* 335 U.S. 469 (1948), and quotes at length from this opinion, sought to be distinguished by Respondent. The Court in *Lane* did observe in footnote number 4 at page 182 that the *Michelson* decision had some language which did not accord with the decision in *Lane. Lane* was referring to page 475 in *Michelson* where the Court observes:

> "The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime."

Michelson then states in a footnote appended to this quotation that:

> "This (rule) would be subject to some qualifications, as when a prior crime is an element of the later offense; for example, *at a trial for being an habitual criminal.* There are well-established exceptions where evidence as to other transactions or a course of fraudulent conduct is admitted to establish fraudulent interest as an element of the crime charged." (Emphasis added)

It is difficult to perceive how the *Lane* opinion could cite the *Michelson* case and then purport to distinguish it logically.

Michelson not only clearly suggests that the Supreme Court of the United States approves of the practice in habitual offender cases of informing the jury of prior convictions and offering proof thereof, but *Michelson* also points to the long and firmly entrenched rule that other, extraneous crimes, may be shown to establish intent. Along with intent, proof of extraneous crimes has been permitted to show identity, motive and plan or design. Proof before the jury of crimes committed by the defendant other than those charged in the indictment has been approved in *Roe v. United States,* 316 F.2d 617 (5th Cir. 1963), and *Huff v. United States,* 273 F.2d 56 (5th Cir. 1959).

Lane v. Warden also points out another area where the jury can properly be apprised of crimes which the defendant has committed other than the crime charged. This is where the defendant puts his character in issue through the use of character witnesses or by himself taking the stand and so permitting interrogation as to previous convictions.

The *Lane* theory that informing the jury of prior crimes must necessarily destroy the impartiality of the jury, is further refuted by the procedures authorized in Rules 8 and 13 of the Federal Rules of Criminal Procedure.

Rule 8 permits the joinder of two or more offenses in the same indictment as well as the joinder of defendants. Rule 13 authorizes the Court to order the consolidation of two or more indictments in a joint trial. Under the authority of these rules, promulgated by the Supreme Court of the United States, an information charging 225 separate and distinct crimes was upheld in *United States v. Taylor,* 207 F.2d 437 (2nd Cir. 1953). In *Brandenburg v. Steele,* 177 F.2d 279

(8th Cir. 1949), the defendant was indicted for 11 separate offenses of unlawful sales of narcotic drugs. In discussing Rules 8(a) and 13 and their predecessor statute, the Court observed:

> "... In view of the statute and the Rules prescribed by the Supreme Court above referred to, which authorized the procedure which resulted in the appellant's conviction, it is obvious that he is entirely mistaken in his assertion about denial of due process. He was dealt with in accordance with long established and conventional federal procedure."

Under the philosophy of *Lane v. Warden,* the federal procedure in charging separate offenses in one indictment and the consolidation of indictments should be struck down and declared violative of the constitutional guarantee to a fair and impartial trial. Surely the impact upon the jury which *Lane* worries about (the reading of an indictment charging two previous convictions) is greater and more destructive to impartiality when an information charging 225 separate offenses is read or when an indictment charging 11, distinct, unlawful sales of narcotics is read. Nevertheless, the federal practice of using multiple-count indictments and the consolidation of indictments finds continued sanction in federal decisions. See *United States v. Rabin,* 316 F.2d 564 (7th Cir. 1963); *Finnegan v. United States,* 204 F.2d 105 (8th Cir. 1953) cert.den. 346 U.S. 821, reh. den. 346 U.S. 880; *United States v. Pullings,* 321 F.2d 287 (7th Cir. 1963); *Williams v. United States,* 317 F.2d 545 (C.A.D.C. 1963). See also *Gore v. United States,* 244 F.2d 763 (C.A.D.C. 1957) affirmed 357 U.S. 386.

Respondent does not quarrel with the general rule that evidence showing the accused has committed a

crime or crimes independent of the crime charged is inadmissible. The basis of this tenet is that the tendency of such evidence to prejudice the jury outweighs the probative evidentiary value in the usual case. However, the rule is not a constitutional right, but rather is a rule of evidence. *Baltimore Radio Show v. State,* 67 A.2d 497, 510, reversed on other grounds. The limitation on the admission of evidence of other crimes is subject to a number of exceptions, as have been noted above, the exceptions being founded on considerations of justice and wisdom just as is the exclusionary rule itself. *Gianotos v. United States,* 104 F.2d 929 (8th Cir. 1939); *Braggs v. United States,* 176 F.2d 317, 321 (10th Cir. 1949) cert.den. 338 U.S. 861. In the case of habitual offenders, the purpose of the statutes is to protect society from a person or from criminals who persist in the commission of crime and by serving as a warning to first offenders. *Gore v. United States,* supra. These considerations override, and logically so, the rule forbidding the introduction of and proof of other crimes.

Respondent submits that the Texas practice of handling habitual offenders in no way denies to defendants a fair and impartial trial under all principals, standards and doctrines of the law (except *Lane v. Warden*). Respondent does not say that there could not be a better method of proving prior crimes for the purpose of enhancing punishment or a method that is more favorable to the defendant, but Respondent does maintain that the Texas procedure in no way contravenes any of the protections or rights guaranteed by the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am an Assistant Attorney General of the State of Texas and a member of the Bar of the Supreme Court of the United States, and do now enter my appearance in the Supreme Court of the United States in the above captioned cause, on behalf of the Respondent; I do further certify that a copy of the foregoing brief has been forwarded by United States Mail, First Class, Postage Prepaid, to Charles Owen Melder, Attorney at Law, 739A Tennessee Building, Houston, Texas, 77002, Attorney for Petitioner, this the 2 day of November, 1965.

Assistant Attorney General